(Submitted upon consent of the parties)

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 993

CHARLES TANNENBAUM,

Appellant,

against

STATE OF NEW YORK,

Respondent.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT AND UPON THE MERITS

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Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc. of 1 Park Avenue, New York, N. Y. is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 192 members of the Council publish and distribute over 85% of all general books published in the United States. Neither Appellant nor the publisher of the work in question is a member of the Council.

The Council is deeply interested in safeguarding freedom of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. It

sought leave to and did obtain consent of the parties to file this brief, because it believes that Section 484-i of the New York Penal Law is unconstitutional. The Council as a matter of policy takes no position with respect to the obscenity *vel non* of any publication and, therefore, this brief will not address itself to the magazine here involved.

ARGUMENT

POINT I

Section 484-i of the New York Penal Law is unconstitutionally vague.

The statute here in question, Section 484-i of the New York Penal Law, is one of two New York statutes dealing with virtually the same problem—the sale of pornographic material to minors. The wording of the other statute, Section 484-h of the New York Penal Law, is obviously intended to relate to criteria set forth in several decisions of this Court on obscenity, although these criteria have been modified and weakened in order to apply to sales to minors rather than to adults. (See sub-section 484-h.1(f) of the statute, reprinted at pp. 13-14, Jurisdictional Statement.)

In contrast to Section 484-h, Section 484-i (p. 15, Jurisdictional Statement) applies to material which is "posed or presented in such a manner as to exploit lust for commercial gain" (Sub-sections 1 and 2; the phrase "written or presented" rather than "posed or presented" is used in Sub-section 3). Not only does a reading of the statute indicate that this quoted phrase is its operative criterion, but in its opinion sustaining the constitutionality

of this statute, the New York Court of Appeals emphasized that the *sine qua non* of any prosecution under the statute was proof that the material was "posed or presented in such a manner as to exploit lust for commercial gain".

We submit that under any circumstances the operative phrase of Section 484-i is so vague as to render the statute unconstitutional. However, the opaqueness of this language is immeasurably compounded when contrasted with the words of its companion statute Section 484-h. Section 484-i undoubtedly covers situations where a prosecutor would not be able to prove a strong enough case to obtain a conviction under Section 484-h. But precisely what situations the legislature had in mind is unclear. As Chief Judge Fuld stated in his dissent herein: "It is difficult to understand the place which Section 484-i is intended to fill in the legislative scheme".

Further complicating the interpretation of this statute is the use of an operative criterion involving commercial intent. This Court has recently stated that commercial intent cannot be a criterion for judging whether or not a particular defendant is guilty of publishing obscenity; *Ginzburg* v. *United States,* 383 U. S. 463 (1966):

> "* * * No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."

In another context this Court has very recently reiterated that the presence or absence of commercial motive

cannot affect the rights of a particular publication; *Time* v. *Hill,* U. S. (No. 22, October Term 1966, decided January 9, 1967).

> "The requirement that the jury also find that the article was published 'for trade purposes,' as defined in the charge, cannot save the charge from constitutional infirmity. 'That books, newspapers and magazines are pubilshed and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.' Joseph Burstyn, Inc. *v.* Wilson, 343 U. S. 495, 501; see New York Times Co. *v.* Sullivan, 376 U. S., at 266; Smith *v.* California, 361 U. S. 147, 150; cf. Ex parte Jackson, 96 U. S. 727, 733; Grosjean *v.* American Press Co., 297 U. S. 233; Lovell *v.* Griffin, 303 U. S. 444."

Yet Section 484-i makes the constitutionally prohibited factor of commercial intent its sole operative criterion.

As a result of all of this, the meaning of Section 484-i is incomprehensible. Accordingly the statute should be declared unconstitutionally vague.

POINT II

The statute is unconstitutional because it contains no requirement of knowledge on the part of the defendant as to the age of the purchaser.

Once again in contrast to Section 484-h, Section 484-i imposes absolute liability upon anyone selling a prohibited publication to anyone "actually or apparently under the age of 18 years". It is not a defense that the defendant in good faith believed that the purchaser was over the age of 18 years. Indeed, the statute as worded would

impose a criminal liability on a defendant who sold a publication to a minor in reliance upon a fraudulent or forged document indicating that the purchaser was over 18.

Moreover, the wording in this regard is also vague since it prohibits sales to a person "apparently under the age of eighteen years". Whether or not this makes a person liable for sales to persons who appear to be under eighteen, when they are in fact over eighteen, is unclear.

As Chief Judge Fuld pointed out in his dissent in the New York Court of Appeals, the net effect of such absolute liability must be to hinder the flow of information and ideas to adults as well as minors.

CONCLUSION

For the reasons above stated, we urge this Court to hold Section 484-i of the New York Penal Law unconstitutional.

Respectfully submitted,

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